

THE HUMAN RIGHTS ACT REFORM

39 ESSEX CHAMBERS WEBINAR, 23 FEBRUARY 2022

Where we are and how we got here: Sir Jonathan Jones QC (Hon)

- Conservative Party manifesto pledge to “update the Human Rights Act and administrative law ...”
- Lord Chancellor & Justice Secretary is not a fan of the HRA
- Two reviews:
 - Independent Review of Administrative Law (IRAL), chaired by Lord Faulkes. Led to clauses in the Judicial Review and Courts Bill
 - Independent Human Rights Act Review (IHRAR), chaired by Sir Peter Gross. IHRAR report published in December 2021

IHRAR report: main points

- Continued adherence to the ECHR
- Change to the section 2 test: apply domestic statute and case law first, before taking into account ECtHR case law
- Change to section 3: court must first apply the “normal rules of interpretation”; only if, applying those rules, is it impossible to interpret the relevant legislation compatible with ECHR, must a court go on to read the legislation so that it is compatible, so far as it is possible to do so
- Introduction of power to make an ex gratia payment when a declaration of incompatibility is made under section 4
- Power to suspend quashing orders or make them prospective only
- Non-legislative recommendations

Government consultation: main points

- Continued adherence to the ECHR
- Replace HRA with a new “British Bill of Rights”
- Section 2: two options for reform, making it clear that the UK courts are not required to follow any judgment of the ECtHR
- Section 3: legislation to be interpreted compatibly with the ECHR only where that is consistent with an “ordinary reading of the words used” and the “overall purpose of the legislation
- New “permission stage” for human rights claims
- More guidance to courts on how to balance “qualified and limited rights”, and weight to be given to Parliament’s assessment ... deportations not to be frustrated by human rights claims ...
- Courts should take into account a claimant’s conduct in deciding whether to award a remedy for a human rights claim
- Right to trial by jury?

Some reactions and some questions

- Divergence between IHRAR report and government proposals
- Missing detail
- What difference would the proposed changes make in practice?
- Risk of unintended consequences
- Invitation to (re-)litigate
- More cases to Strasbourg? (Sending rights away from home)